Filed 12/27/18 In re John K. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JOHN K., a Person Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. ALYSSA R., Defendant and Appellant.	F077261 (Super. Ct. No. 517487) **OPINION**

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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Alyssa R. (mother) appeals from the January 31, 2018, order terminating her parental rights (Welf. & Inst. Code, § 366.26)[1] to her son John K., now age three. Mother contends the juvenile court erred by failing to, sua sponte, hold a hearing and appoint a guardian ad litem for her at or before the January 2017 detention hearing on the section 387 petition. Mother contends this purported failure tainted all subsequent proceedings and the case must be returned to the point of filing of the section 387 petition. We affirm.

SUMMARY OF THE FACTS AND PROCEDURES

Prior Family Maintenance Plan

When John K. was born in Santa Clara County in November of 2015, his mother and father[2] were homeless and unable to care for him. Father had been in jail until a few weeks prior to John K.'s birth, for failure to comply with a probation order for drug testing and failure to appear in court. Father had been diagnosed with severe depression, anxiety, obsessive compulsive disorder, and attention deficit hyperactivity disorder. Mother, who was developmentally delayed, had a history of methamphetamine use, but claimed to have quit when she found out she was pregnant. There was also a history of domestic violence between mother and father.

While at the hospital, following John K.'s birth, father yelled at mother when he did not think she changed John K.'s diaper satisfactorily and yelled at John K. when he cried. Father intimidated a nurse and was removed from the hospital by security.

Mother reported she and father had been homeless for four years. Father reported that he was arrested for domestic violence after an altercation with mother's family, in which father threatened to kill mother's brother. Mother claimed the domestic violence

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] Father is not a party to this appeal.

between her and father was verbal. While at the hospital, mother told a hospital social worker she was afraid of father and wanted to move to Modesto with John K. to live with maternal grandmother (hereafter grandmother), but was afraid to tell father and wanted the social worker to do it.

Mother was "slow to process things" and was unable to care for John K. without assistance, even changing his diaper and feeding him. John K. had kidney issues requiring daily medication and could later require dialysis. According to grandmother, mother was "mildly/low range mentally retarded," had an individual education plan in school, and was not capable of giving John K. medication. A nurse reported that mother did not care for John K. when he cried and father talked only about the child in terms of what type of aid they could get for him.

After mother changed her mind about leaving father and decided to stay with him, a protective custody order was obtained. Before the order was carried out, mother agreed to take John K. to live with grandmother in Modesto.

Mother stated she had been using methamphetamine "off and on" for two years. She stopped attending high school in the 12th grade, stating the school work was "too hard" for her. Mother, now 35 years old, had given birth to one previous child, whom she placed for adoption through a private agency because she was unable to care for the child. Mother acknowledged that she needed assistance and supervision in caring for John K. and that being in grandmother's home was better than being homeless. Father declined supervised visits at the Santa Clara County Social Services Agency, stating they were frustrating and emotionally disturbing to him.

In December of 2015, mother and father submitted on a third amended section 300 petition in Santa Clara Juvenile Court. The sustained petition alleged father had untreated substance abuse issues, mental health issues, and a history of domestic violence with mother. As to mother, it alleged she had cognitive delays impacting her ability to care for John K. and a history of untreated methamphetamine use. The Santa Clara

Juvenile Court removed John K. from father's custody but left him in mother's custody with family maintenance services. The case was then transferred to Stanislaus County, where mother and John K. were residing with grandmother.

The recommended case plan developed in Santa Clara County was adopted in Stanislaus County, and mother was to complete a domestic violence assessment, substance abuse assessment and recommendations, a parenting program, and random drug testing. Father was also provided reunification services.

By the time of the six-month review, the Stanislaus County Community Services Agency (Agency) recommended family maintenance services for mother continue, but that reunification services for father be terminated. Mother continued to reside with grandmother, was engaged in her programs, and was cooperative with her social worker. Father had made no efforts to visit John K. and had done none of his service plan.

At the six-month review hearing June 24, 2016, mother was found to have made "good" progress and family maintenance services were continued. Services for father were terminated. The 12-month review was set for December 16, 2016.

At the time of the 12-month review, the Agency recommended family maintenance services continue. While mother needed improvement in certain areas, she was doing well in others. She tested with an IQ level of 55, equivalent to functioning at a third to sixth grade level of intelligence. Her mild cognitive limitations affected her planning, decisionmaking and coping skills. The social worker reported that it was unclear whether mother would ever be capable of living independently and raising John K. On several occasions, mother asked if she could leave grandmother's home and the Agency cautioned against it.

Mother was able to hold a simple conversation and follow one direction or request at a time. She was able to complete household chores and follow a recipe, but had difficulty measuring ingredients. She was able to use public transportation, but had trouble telling time.

At the 12-month review hearing, the juvenile court continued family maintenance services and a section 364 hearing was set for June 9, 2017.

Section 387 Petition

One month later, in January of 2017, the Agency filed a section 387 petition to remove John K. from mother's custody, alleging mother left John K. with grandmother, and was again homeless and using drugs. The Agency had some concerns about grandmother's ability to care for John K. According to grandmother, mother left with a boyfriend before Christmas and had not returned. Grandmother was interested in legal guardianship for John K. When mother was contacted by telephone, she stated she no longer wanted to live with grandmother as the two did not get along. Mother also stated she wanted grandmother to establish legal guardianship of John K. John K. was placed into protective custody.

Detention

The detention hearing was held January 18, 2017. Mother, represented by counsel, was present and responded affirmatively when asked if she read the petition, understood it, and understood the purpose of the hearing. Mother was advised to contact the placement specialist to make arrangements for visits with John K., and mother said, "Okay." John K. was detained. Jurisdiction/disposition was set for March 16, 2017.

Jurisdiction/Disposition

The report prepared for jurisdiction/disposition recommended father be given reunification services, but recommended mother be denied services pursuant to section 361.5, subdivision (b)(14)[3], as she reported she did not want to reunify. Mother spoke to a social worker over the telephone on March 2, 2017, and again identified grandmother as

[3] Section 361.5, subdivision (b)(14) provides that reunification services need not be provided to a parent if the parent has advised the juvenile court that he or she is not interested in receiving reunification services.

a preferred parent for John K. She repeated that she herself did not want services. Grandmother had begun the process to become a placement option for John K.

Mother made no attempts to visit John K. since detention; maternal grandmother visited once. Although mother was referred for various services after detention, she had not followed through and made it clear she did not want services. However, in order to deny services pursuant to section 361.5, subdivision (b)(14), it was necessary for mother to make a knowing and intelligent waiver of services before the juvenile court. It was recommended that she appear at the upcoming hearing to do so. The report noted that, while reunification services for father were previously terminated, they were required to be offered at this point, because John K. had not been removed from both parents at disposition.

At the March 16, 2017, jurisdiction/disposition hearing, mother did not appear. The juvenile court noted that it could not follow the recommendation of the Agency not to offer mother services as she was not present to waive her rights. The Agency stated it was comfortable offering mother services, to which the juvenile court asked, "But is the mother capable actually of —." The Agency noted that mother did not have a guardian ad litem, to which mother's attorney replied, "Which I was actually wondering. I haven't been able to get ahold of her, but I was wondering if maybe that assessment[**4**] would note that."

The social worker explained to the juvenile court that he had spoken to mother that morning and she had related that her transportation to get to court had fallen through. The social worker suggested to mother that they could offer her family reunification services and that she could come into the Agency to see what was offered and begin services. Mother had said she wanted to do that. The juvenile court then stated that it remembered mother from previous hearings and "given the totality of the circumstances,

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4 Mother was referred for a clinical assessment on January 18, 2017.

I think it would be appropriate if [mother's counsel] could at least attempt to reach out to her to see if a guardian ad litem really should be appointed." Mother's counsel stated she would really like to do that, but the Agency noted that a guardian ad litem could not be appointed unless mother appeared. Mother's counsel stated she would have a "frank conversation" with mother and explain the requirements of her presence to be appointed a guardian ad litem. The case was continued for a week for mother's counsel to contact mother. The Agency stated it would prepare a case plan in the event mother did not waive services, but wondered if mother did appear, "does she get a guardian ad litem and do we move forward even then."

On March 23, 2017, mother appeared with counsel. The juvenile court stated it was informed mother did wish to participate in reunification services, and stated, "so obviously the Agency's recommendation would change to provide reunification services to both of the parents; correct?" The Agency stated it had a service plan ready and formally changed its recommendation.

Mother's counsel then made an offer of proof, accepted by the parties, that mother, after talking to the social worker and counsel, decided she would like to accept and participate in family reunification services. The juvenile court sustained the section 387 petition, removed John K. from mother and father's custody, and granted reunification services for both parents. A six-month review was set for September 15, 2017.

Six-Month Review

The report prepared for the six-month review recommended services be terminated for both mother and father. By this time, mother was living with a male friend, was not employed or looking for work, had not started any of her services, and admitted using methamphetamine and marijuana on a daily basis. After the social worker attempted to engage mother in services multiple times, mother told the social worker she was not ready to "get clean" and parent John K., and was equivocal about starting services. Mother brought her friend, Mike, with her to the meeting with the social worker. Mike

was under the influence and unable to sit still in the chair. He claimed to be John K.'s father, but mother refuted that allegation. She stated she did not want her regional center services because she did not need them. She had not visited John K. Father also failed to begin services.

Mother failed to appear for the scheduled six-month review hearing. Her attorney requested a contested hearing, which was set for September 20, 2017. But mother failed to appear that day as well, and services for both mother and father were terminated. A section 366.26 hearing was set for January 18, 2018.

Section 366.26 Hearing

The section 366.26 report recommended parental rights for both mother and father be terminated and adoption established for John K. John K.'s health had been improving and he was meeting his developmental milestones. Mother had not visited John K., but grandmother continued to have once monthly visits, as did a maternal aunt and uncle. The current caregivers were considered prospective adoptive parents.

Mother appeared at the January 18, 2018, hearing and requested a contested hearing, which was set for January 31, 2018. Grandmother was at the originally scheduled hearing and stated she was going through the approval process to become a placement option for John K., but there had been obstacles preventing her from completing the process more quickly. She still wanted John K. placed with her. The Agency stated it was still working with grandmother on this process, but it was unknown whether her home would be approved.

At the contested hearing January 31, 2018, mother was present with counsel, who made an offer of proof that mother objected to the recommendations to terminate parental rights, she loved John K. very much, and did not want to lose him. If John K. was not able to be in mother's custody, she wished him placed with grandmother. Mother asked that if her parental rights were terminated, she be given a final visit.

The juvenile court terminated mother's parental rights, noting mother had not demonstrated any exception to termination. She had not visited John K. in over a year. Grandmother was present and again requested placement, but the juvenile court replied that this was not a placement hearing.

DISCUSSION

Mother appeals from the section 366.26 hearing order terminating her parental rights. The issue she raises on appeal, however, pertains only to orders made at or before the January 2018 section 366.26 hearing. Specifically, she contends the juvenile court erred when it failed to sua sponte hold a hearing on the appointment of a guardian ad litem at the outset of the detention proceedings. As argued by mother, an appointed guardian ad litem would have convinced her to participate in services and visit John K., thereby avoiding termination of her parental rights. She also contends that a guardian ad litem would have facilitated placement of John K. with grandmother rather than in foster care. We disagree and affirm.

Forfeiture

We first address the issue of whether this question is properly before us. Mother did not petition for writ review from the order setting the section 366.26 hearing, which is the exclusively prescribed vehicle for appellate review of all orders issued at that hearing. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021–1023; § 366.26, subd. (*l*).) Normally, failure to seek writ review forecloses mother from seeking relief from any order made at or before the March 2017 dispositional hearing. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815–816; see *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 [pursuant to the waiver rule "an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order"].)

However, as noted by both parties, the court in *In re M.F.* (2008) 161 Cal.App.4th 673, vacated an order terminating parental rights because the trial court failed to appoint

a guardian ad litem for the mother, herself a minor, until after services were terminated and the hearing on termination of parental rights was pending. Although the mother had not filed a writ petition after her reunification services were terminated, *In re M.F.* declined to apply the waiver rule because the "failure to appoint a guardian ad litem in an appropriate case goes to the very ability of the parent to meaningfully participate in the proceedings. For the same reasons that [the mother] needed a guardian ad litem, she was 'hardly in a position to recognize ... and independently protest' the failure to appoint her one." (*Id.* at p. 682.) We will therefore address mother's contention on the merits.

Applicable Law and Analysis

In a dependency case, a parent who is mentally incompetent must appear by a guardian ad litem appointed by the court. (Code Civ. Proc., § 372; *In re Sara D.* (2001) 87 Cal.App.4th 661, 665.) The test is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case. (*In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1186; *In re Sara D., supra,* at p. 667.) The effect of the guardian ad litem's appointment is to transfer direction and control of the litigation from the parent to the guardian ad litem. (*In re Jessica G., supra,* at pp. 1186–1187; *In re Sara D., supra,* at p. 668.)

Before appointing a guardian ad litem for a parent in a dependency proceeding, the juvenile court must hold an informal hearing at which the parent has an opportunity to be heard. (*In re Sara D., supra*, 87 Cal.App.4th at p. 663.) The court or counsel should explain to the parent the purpose of the guardian ad litem and the grounds for believing that the parent is mentally incompetent. (*Id.* at p. 672.) If the parent consents to the appointment, the parent's due process rights are satisfied. (*Id.* at p. 668.) A parent who does not consent must be given an opportunity to persuade the court that appointment of a guardian ad litem is not required, and the juvenile court should make an inquiry sufficient to satisfy itself that the parent is, or is not, competent. (*Id.* at p. 672.) If the

court appoints a guardian ad litem without the parent's consent, the record must contain substantial evidence of the parent's incompetence. (*Id.* at p. 673.)

Alleged Sua Sponte Obligation to Appoint a Guardian Ad Litem

In the present case, no request for appointment of a guardian ad litem was made. However, mother contends that the juvenile court had an obligation to sua sponte hold a hearing and appoint a guardian ad litem for her. We disagree.

"[W]hen the trial court already has knowledge of [a parent's] incompetency, the trial court has an obligation to appoint a guardian ad litem sua sponte." (*In re Lisa M.* (1986) 177 Cal.App.3d 915, 919; see *In re A.C.* (2008) 166 Cal.App.4th 146, 155.) When this is not the case, the need to inquire into the competence of a parent in dependency proceedings is left to the sound discretion of the juvenile court. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1366–1368.) An erroneous failure to appoint a guardian ad litem is a statutory error and is reversible only if "a different result would have been probable had the statutory error not occurred." (*In re A.C., supra,* at pp. 154, 157–159; accord, *In re Lisa M., supra,* at p. 920, fn. 4.)

To be obligated to appoint a guardian ad litem sua sponte, the juvenile court must have knowledge that the party is incompetent. Mother argues her incompetence was apparent from her inability to process the information given to her, her low I.Q., her slow comprehension, her limited ability to plan and make decisions, her inability to provide for her physical needs properly, and her inability to assist counsel in her own defense.

The facts here are that mother appeared in juvenile court several times over the period of the previous year during her family maintenance case. She was actively participating in services, albeit slower than might have been hoped. The social worker noted that, while it was sometimes difficult to tell if mother understood a conversation, she followed through both in attending services and in using the skills taught in parent class in the parent-child labs, demonstrating that she had understood and absorbed the information.

At detention after the section 387 petition was filed, mother, who was represented by counsel throughout the proceedings, indicated she understood the nature of the proceedings. Counsel did not indicate mother was having any difficulty doing so.

At jurisdiction, when it was reported that mother wished to waive her rights to reunification, the juvenile court sua sponte raised the issue of mother's cognitive delays and questioned whether she could give a knowing and intelligent waiver of such rights, or whether a guardian ad litem should be appointed. Since mother was not present, no such appointment could be made. The juvenile court stated it would be appropriate for mother's counsel to "at least attempt to reach out to her to see if a guardian ad litem should be appointed." Counsel stated she would do so, and would report back to the juvenile court.

When the case convened a week later, mother was present in court with counsel, and it is implied from the record that an off the record conversation took place between the juvenile court and counsel, because the court stated it had been informed that mother now wished to participate in reunification services. Counsel explained that, after mother spoke to counsel and the social worker, she decided she would like to accept and participate in family reunification services. There is nothing on the record as to any conversation concerning the issue of appointing a guardian ad litem at that time.

At subsequent hearings, mother was either absent or present and participated in the proceedings by way of offers of proof through counsel. We agree with respondent that, while there are facts reported that brought mother's mental acuity into question, no error occurred.

Even if the juvenile court erred in failing to appoint a guardian ad litem—or erred in failing to inquire further or to hold a hearing—mother has not shown that reversal is required. A dependency court's failure to appoint a guardian ad litem does not require reversal unless it substantially prejudiced the person's interests, in that "a different result

would have been probable had the error not occurred." (*In re A.C., supra,* 166 Cal.App.4th at p. 157; see *In re James F.* (2008) 42 Cal.4th 901, 918–919.)

Mother asserts a guardian ad litem would have affected the outcome as follows: a guardian ad litem would have advocated for additional or different services for mother, and a guardian ad litem would have negotiated on mother's behalf to have John K. placed with grandmother at disposition.

Mother was offered a host of services and the social worker attempted multiple times to engage mother in services, but mother was not interested. It is clear from mother's previous participation during family maintenance services that she was capable of both participating and benefiting from services, but subsequently chose not to participate, and instead return to a life of drugs and homelessness without an effort to care for John K.

In addition, maternal grandmother began the process of having John K. placed in her home in February of 2017, but as of March 2018, had still not completed the process. The only explanation in the record of the delay is that maternal grandmother reported at the section 366.26 hearing that there were "obstacles" in her way by having recently moved to Stanislaus County.

We find a guardian ad litem would not have had any impact on either of these issues. The role of the guardian ad litem is to stand in the parent's shoes for the litigation aspects of the case and assist the parent's attorney in preparing the case and making tactical decisions that would normally be made by the parent. (*In re Jessica G., supra,* 93 Cal.App.4th at pp. 1186–1187; *In re Sara D., supra,* 87 Cal.App.4th at p. 668.) Not, as mother contends, to advocate for additional or different services for her or negotiate on her behalf to have John K. placed with grandmother at disposition. Those duties fall to her attorney.

DISPOSITION

The orders are affirmed.

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FRANSON, J.

WE CONCUR:

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LEVY, Acting P.J.

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SNAUFFER, J.